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Apprehension of Bias Treadmill: Critiquing the *Popat* Decision in light of the Capital Market Authority's Enforcement Mandate.

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Declaration

I, **Shamiah Muchesia**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: 29/2/2024.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: Eunice Kiumi.....

Mrs. Eunice Kiumi

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This project is dedicated to anyone and everyone who dares to dream; and refuses to be bound by what others see as ‘impossible’. The world is (y)our oyster.

Abstract

Society ascribes value to the law based on its utility within society. Any such law that potentially jeopardizes the growth, development or welfare of a society is often faced with criticism and backlash. Legal decisions are no different: their value is contingent on their ability to solve societal problems and increase overall happiness. This standard remains the same for the *Al Nashir Popat and others v CMA* Supreme Court's decision in 2020: its value is contingent on how it solves the existing problems and thereby increasing net happiness.

This article analyses the *Popat* decision in light of the CMA's enforcement mandate. The decision gives the solution on mandatory delegation under Section 11A of the Capital Markets Act. The paper argues that while the rationale behind it is proper, the mechanism under Section 11A does not deal with the recurrent problem of apprehension of bias. As a matter of fact, the solution may well exacerbate the hurdles to be faced by the regulator in the discharge of their mandate. The impact may be that investors and the regulator fall behind in ensuring market safety, while the errant market players benefit.

The paper juxtaposes the current situation with the bi-furcated model in Canada's Quebec territory, and how they have been able to deal with the problem of apprehension of bias. The paper suggests that Kenya should adopt a similar model of bi-furcation so as to curb the existing problems of bias.

List of Abbreviations

AG	-	Attorney General
AMF	-	Autorité des Marchés Financiers
Bureau	-	Bureau de decision of de révision en valeurs mobilières
CMA	-	Capital Markets Act
CEO	-	Chief Executive Officer
DPP	-	Director of Public Prosecution
FOMO	-	Fear Of Missing Out
IPOA	-	Independent Police Oversight Authority
IOSCO	-	International Organization of Securities Commissions
ICCPR	-	International Convention on Civil and Political Rights
KACC	-	Kenya Anti-Corruption Commission

List of Cases

1. *Al Nashir Popat and 8 others v. CMA (2016) eKLR.*
2. *Al Nashir Popat and 7 others v. CMA (2020) eKLR.*
3. *Attorney General and another v. Independent Police Oversight Authority (IPOA) and another (2015).*
4. *Brosseau v. Alberta Securities Exchange (1989) Canadian Supreme Court 1 SCR 301.*
5. *Chadwick Okumu v. CMA (2018) eKLR.*
6. *Ernst and Young LLP v. CMA and another (2017) eKLR.*
7. *Jeremiah Gitau Kiereini v. CMA and another (2012) eKLR.*
8. *Solomon Muyeka Alubala v. CMA (2019) eKLR.*

List of Legal Instruments

National

1. *Capital Markets Act (Chapter 485A), 1989.*
2. *Commission on Administrative Justice Act, 2011.*
3. *Constitution of Kenya, 2010.*
4. *Fair Administrative Action Act, No. 4 of 2015*.

Quebec

1. *Act Respecting Administrative Justice, Chapter 54 of 1996.* (Assented on 16 December 1996.)
2. *Securities Act, Quebec* (In force since November 1 2022).

International

1. *International Covenant on Civil and Political Rights (ICCPR) (*Adopted by General Assembly on 16 Dec 1966).

CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND

1.1 Background

The Capital Markets Authority (CMA) was created under the Capital Markets Act[1] with the task of developing and regulating the market. Its enforcement toolkit entails both criminal proceedings and administrative action[2] against errant players. Their administrative process entails a multiplicity of functions to be handled by the CMA such as investigation, inquiry, and reaching a final verdict.[3] Where one is found liable, sanctions may be imposed by CMA.[4] Over time, administrative action has proven to be the most effective enforcement tool In CMA's arsenal.[5]

However, challenges have continued to mar this administrative procedure. Many suspects have continuously moved to court to delay[6] as well as escape the process.[7] The greatest common ground of disagreement has been that the performance of the overlapping functions contravenes the rule against reasonable apprehension of bias rendering the administrative process procedurally unfair. This is because the CMA acts as accuser, investigator, prosecutor, judge, and enforcer and hence failing to appear as impartial.

Initially, the *Ernst and Young LLP* case[8] declined this position by finding that the overlapping functions of a statutory body are an exception to the apprehension of bias test of procedural fairness that arise from its statutory mandate. This interpretation, as this paper hypothesizes, was a holistic appreciation of the process carried out in consonance with the nature of the CMA.

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[1] Chapter 485A, Laws of Kenya.
[2] The CMA is empowered to undertake administrative action under Section 11(3)(cc) and (h) *Capital Markets Act*.
[3] Section 11(3), *Capital Markets Act* (Chapter 485A).
[4] Section 25A, *Capital Markets Act* (Chapter 485A).
[5] Kotonya A, 'Combating Insider Trading in Kenya's Capital Markets: Challenges and Opportunities for Reform', Published, University of Nairobi, Nairobi, 2012. The author concluded that criminal proceedings often fail due to the high legal burden in the beyond reasonable doubt threshold. In fact, no conviction has been arrived at in insider trading due to the same.
[6] *Al Nashir Popat and 8 others v CMA* (2016) eKLR and *Jeremiah Gitau Kiereini v CMA and another (2012) eKLR.*
[7] *Solomon Muyeka Alubala v CMA(*2019*)* eKLR. The *Chadwick Okumu v CMA* (2018)eKLR decision helped one Uchumi director evade substantive justice due to a procedural technicality as ruled by the court.
[8] *Ernst & Young LLP v CMA and another* (2017) eKLR.

The Supreme Court however, decided the *Al Nashir Popat* (*Popat*) case[9] in 2020 changing the operations trajectory of the CMA. The court stated that performing these overlapping mandates resulted in a reasonable apprehension of bias which therefore required mandatory delegation of authority by the CMA to other independent persons under Section 11A Capital Markets Act.[10]

This mandatory delegation of functions completely changes CMA's proceedings, and as this paper hypothesizes, has made the administrative process a burden. In fact, one remains to wonder whether indeed the apprehension of bias is eventually dealt with as a result of delegation. Thus, while the *Popat* decision seeks to make the process procedurally fair, it adds structural burdens upon the Authority without assurances on whether the problem is eventually solved. The impact may be detrimental because on a cost benefit analysis, the harms may outweigh the benefits of such proceedings due to such delegation.

[9] *Al Nashir Popat and 7 others v CMA*(2020) eKLR.
[10] Section 11A, *Capital Markets Act* (Chapter 485A).

1.2 Statement of Problem

Section 11 of the Capital Markets Act gives the CMA the mandate to investigate, inquire and sanction errant market players. This creates overlapping mandates whose existence has formed the basis of multiple suits on impartiality against the CMA. This is because the performance of the overlapping mandates enables the CMA to act as the accuser, investigator, prosecutor, judge and jury.

The *Al Nashir Popat* decision scrutinized these mandates, and called for mandatory delegation of functions to other bodies by the CMA under Section 11(A) Capital Markets Act. The paper hypothesizes that this solution is unable to solve the recurrent 'apprehension bias' problem. In fact, the solution may well be impractical and hamper the CMA's efficiency. This study thus aims to examine whether the solution offered by the Supreme Court in the *Popat* decision, is appropriate, in light of the enforcement mandate of the CMA.

1.3 Research Questions

1. a) Whether the solution adopted in the *Popat* decision under Section 11a Capital Markets Act solves the regulator's headache of apprehension of bias?

   b) To what degree is the solution in *Popat* feasible?

2. What impact does the *Popat* decision have on the various stakeholders in the capital markets landscape?

3. What legal position best ensures a proper balance between the CMA's quasi-judicial and administrative efficiency and the individuals' right to a fair procedure?

1.4 Research Objectives

1. To assess whether the solution adopted in the *Popat* decision under Section 11A Capital Markets Act solves the regulator's headache of apprehension of bias, and to what extent it is practical.

2. To examine the impact that *Popat* decision has on the various players in the capital markets landscape.

3. To examine and propose a legal position that best ensures a proper balance between CMA's quasi-judicial & administrative efficiency, and the right to a fair procedure.

1.5 Hypothesis

In 2020, the Supreme Court of Kenya recently adopted a legal position that discourages the performance of overlapping mandates by the CMA, where such performance may lead to disregard of procedural fairness requirements such as the rule against bias. The interpretation pursues the adherence to procedural justice, through the application of the 'apprehension of bias' test. The study argues that while procedural fairness is key, it needs to be balanced together with the CMA's efficiency. The court's solution under Section 11A Capital Markets Act limits the CMA's efficiency without solving the problem, hence making it burdensome for the regulator. The study proposes the bi-furcated model of delegation as a potential solution to curb the recurrent problem of apprehension of bias.

1.6 Justification

This study is thus important from a market efficiency and regulation perspective. Previous studies on the enforcement mandate of the CMA have been limited to analyzing the historical analysis of the past practices of the CMA. This study will therefore be unique as it assesses the CMA's overlapping mandate and whether the solution given by the Supreme Court in the *Popat* decision solves apprehension of bias and how it contributes to the efficiency of the CMA. This will be helpful to scholars, lawmakers and decision makers involved in administrative and quasi-judicial proceedings. Similarly, this study may have an impact on other regulators that may be affected by the *Popat* decision such as the Competition Authority of Kenya.

1.7 Conceptual Framework: Efficiency as an integral part of administrative justice

The study will rely on one major conceptual framework: Efficiency as an integral limb of administrative justice. Here, the focus will be on how efficiency simply cannot be separated from good administration as well as the assurance of justice. Hence, for administrative justice to consistently be done, efficiency of the administrative body must always be prioritized. The concept is divided into two bits for easier understanding: efficiency and administration; and efficiency and justice.

1.7.1 Efficiency and administration

Efficiency is the ability to achieve the greatest possible product through minimal wastage of efforts or resources.[11] Some scholars have also defined efficiency as the use of available means and resources to produce optimum results in the most expeditious, economical and less strenuous manner.[12]

Article 47(1) Constitution of Kenya emphasizes on the need to promote efficiency as a tenet of fair administrative action. Professor Migai Akech classifies administrative bodies into two major categories: public bodies and private bodies doing either public or private functions.[13]Public administrative bodies exist to wield their mandate from the State to perform a certain action out of public interest.[14] Usually, such bodies are put in place through statutory mandate to oversee a specific branch of public law and as such, their primary mandate usually is to ensure efficiency in the allocated task.[15]

Efficiency is one of the essential elements of a functional administrative system.[16] This is because efficiency ensures that administrative bodies are able to deal with their administrative responsibilities effectively. Some scholars have in fact posited that a government's ability to run effectively, is heavily dependent on efficiency of administrative

[11] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', Published, University of Nairobi LLB Dissertation, Nairobi, 2015', 58.
[12] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.
[13] Akech M, *Administrative Law*, Strathmore University Press, Nairobi, 2017, 349.
[14] Akech M, *Administrative Law*, 349.
[15] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.
[16] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.

bodies.[17] This explains why it is very important for the State to prioritize efficiency of administrative bodies.

However, efficiency is not only a tenet of good administration as it also correlates with the regulation and growth of the economy[18] and the market.[19] This is because growth within both the market and the economy is dependent on administrative institutions, and the level of trust people have in them.[20] The reason why administrative bodies were placed in these spaces in the first place was so as to correct the existing deficiencies in the market, and hence, such efficiency creates utility and trust.[21]Hence, the Judiciary and other decision makers play an important role in determining the market performance at a given point in time.[22]

For such administrative bodies to achieve administrative efficiency, there exists the need to ensure that they possess the power to act efficiently and promptly.[23] Similarly, reducing the burdens that they possess in the exercise of their powers allows for their efficiency as an administrative body.[24] The negative holds true, that a limitation on such administrative powers of an administrative body leads to their inefficiency. Such inefficiency is bad because it poses a danger not only to the administrative body but also to the members of the public. This is because inefficiency leads to a reduced level of deterrence within the market,[25] risks losing investor confidence and generally lessens the regulator's grip. This is bad because the administrative body is limited in its oversight mandate, leaving market problems and injustice to flourish.

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[17] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.
[18] Lorizio M & Guirreri R, 'Efficiency of Justice and Economic Systems', *Procedia Economics and Finance,* 17 (2014) -<Efficiency of Justice and Economic Systems - ScienceDirect>-.
[19] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.
[20] Lorizio M & Guirreri R, 'Efficiency of Justice and Economic Systems', 104.
[21] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.
[22] Ippolity R & Tria G, 'Efficiency of judicial systems: Model definition & output estimation' *Journal of Applied Economics(*Routledge Taylor & Francis Group)*, 2020, Vol 23(1)*, 385 -<Full article: Efficiency of judicial systems: model definition and output estimation (tandfonline.com)>-.
[23] Brynard J, 'The Duty to Act: A Flexible Approach to Procedural Fairness in Public Administration', *Administration Publica Vol 18,* 4 Nov 2010, 138-<The duty to act fairly : a flexible approach to procedural fairness in public administration (unisa.ac.za)>-.
[24] Brynard J, 'The Duty to Act: A Flexible Approach to Procedural Fairness in Public Administration',138.
[25]Lorizio M & Guirreri R, 'Efficiency of Justice and Economic Systems', 106.

1.7.2 Efficiency and justice

In a judicial sense, efficiency speaks as to the need to increase the outcomes of justice and fairness while reducing the delays, expenses and problems experienced.[26] Hence, the main concern of the concept is to effectively utilize the available resources so as to ensure promotion of justice.[27] It plays a key role in promoting justice by administrative bodies making quasi-judicial decisions pursuant to Article 47(1) Constitution of Kenya.[28] The said Article recognises the need to ensure efficiency as a key facet in fair administrative action together with other tenets such as procedural fairness.

To examine judicial and quasi-judicial efficiency, scholars have paid attention to a number of factors such as the time required to clear cases,[29] number of cases completed and clearance rates.[30]

For a better understanding of how efficiency relates to justice, it is key to interrogate the historical evolution of justice in Kenya. In the past, many decisions by judicial or quasi-judicial bodies were made out of affiliations to the Executive.[31] This included the dragging of cases for years both at administrative and judicial level. This was a prime example of judicial inefficiency, leading to injustice[32] and loss of trust in the judiciary.

However, the transformation that came with the Constitution of Kenya 2010 sought to rip such inefficiencies off.[33] There existed the burning desire to reform judicial and administrative procedures to make them more efficient and ease the access to justice. This is evidenced by the establishment of the Judicial Service Commission and Commission on Administrative Justice which look into undue delays, inefficiency and incompetence within

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[26] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.
[27] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.
[28] Art 47 (1) *Constitution of Kenya*, 2010.
[29] Stanislaus B, et al., ' Fairness of Trial: The Impact of Procedural Justice and Other Experimental Factors on Criminal Defendants' Perceptions of Court Legitimacy in Poland', *Law and Society Inquiry,* Vol 44(2), 2019, 364-<Fairness at Trial: The Impact of Procedural Justice and Other Experiential Factors on Criminal Defendants' Perceptions of Court Legitimacy in Poland | Law & Social Inquiry | Cambridge Core>-.
[30] Ippolity R & Tria G, 'Efficiency of judicial systems: Model definition & output estimation', 386.
[31] Franceschi L and Lumumba P, *The Constitution of Kenya 2010: An Introductory Commentary*, Strathmore University Press (2nd edition), Nairobi, 2019, 220.
[32] This is because Justice that is delayed causes severe injustices.
[33] Ochiel D, 'Transformation of Judicial Review in Kenya under the 2010 Constitution of Kenya', 58.

judicial and administrative services.[34] This proves the role that has been placed on efficiency by the Constitution in accessing justice as seen under Article 159(2)(b) and (d) which seek to achieve justice through utilising minimal time and resources.

Efficient justice by a public administrative body creates a culture of discipline and trust from the public, due to the promise of achieving justice.[35]

Justice therefore has to be accompanied by the concept of efficiency. For justice to be done, it requires an efficient process and expeditious solvency of disputes. Therefore, even for a body like the CMA, efficiency comes as a form of justice. This is because it ensures that disputes are solved in a faster manner. Reducing efficiency would lead to less justice due to the much time that would need to be spent on issues like delegation.

[34] Section 4, *Commission on Administrative Justice Act*, 2011.
[35] Stanislaus B, et al., ' Fairness of Trial: The Impact of Procedural Justice and Other Experimental Factors on Criminal Defendants' Perceptions of Court Legitimacy in Poland', 383.

1.8 Literature Review

1.8.1 On the *Popat* solution and its contribution to CMA's efficiency

Very little work exists on the trade off made between efficiency and procedural fairness by the CMA as a result of the Popat decision. Mbaluto J and Mutua H in their article report on the court's weigh up on justice and efficiency in the Popat decision.[36] They note that the court, while evaluating the need for efficiency within the CMA's enforcement, found that the overlapping mandates could not be performed by other separate persons. However, the court went on to invalidate any such claim as to efficiency in favour of procedural justice. The court then gave the solution of delegation of the overlapping mandates to other parties.

Brynard posits in his article that justice and efficiency are interdependent concepts that work in close connection to ensure utility.[37] He further argues that the concepts exist together.

Wade and Forsyth in their book[38]observe that most administrators view procedural restrictions as a tool used by lawyers to obstruct efficient administrative procedures.[39] This is important as most administrative bodies view efficiency as a more necessary and urgent tool to aid their mandates as compared to the right to procedural fairness.

Robert in his lecture addresses the issue that over-judicialization of administrative procedures that are meant to run efficiently hinders justice.[40] This therefore proves the point that indeed, at some certain times, the rigid pursuit of procedural justice affects how the efficiency of an administrative body exists. In fact, it leads to less efficiency on the part of the administrative body.

Similarly, Simon Atrill also suggests that balancing between procedural rights and the required contextual factors such as the need to promote efficient public decision making is

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[36] Mbaluto J and Mutua H, 'Delving Deeper: Supreme Court Affirms Dual Enforcement and Investigating Mandates of the CMA', *Oraro and Co Advocates* -< Delving Deeper: Supreme Court Affirms Dual Enforcement and Investigatory Mandates of the Capital Markets Authority – Oraro & Company Advocates>-
[37] Brynard J, 'The Duty to Act: A Flexible Approach to Procedural Fairness in Public Administration', 138
[38] Wade and Forsyth, *Administrative Law*, Oxford University Press, Oxford, 8th ed., 2000, 435.
[39] Wade and Forsyth, *Administrative Law, 435 & 436.*
[40] Robert S, 'Procedural Fairness- Indispensable to Justice?', *The University of Melbourne Law School*,2010, 3-<Microsoft Word - Sir-Anthony-Mason-Lecture1.doc (hcourt.gov.au)-.

key.[41] This is key because it proves the need for prioritisation of the efficiency of administrative bodies so as to remain relevant and tackle the problem set out in the first instance. This is a similar position taken by John Griffin in his article, that consideration needs to be given to relevant statutory provisions that inform the need for efficiency of an administrative body so as to ensure a balance between efficiency and procedural fairness.[42]

1.8.2 On what interpretation best ensures a proper balance between efficiency and procedural fairness.

Mbaluto J in the article endorses an interpretation similar to that in the *Brosseau* case.[43] This is as the case endorses the view that statutory bodies performing duties in line with their enabling Statutes should not be at fault while exercising their overlapping mandates. This perception looks at statutory bodies' overlapping mandates as a tool for them to achieve efficiency, as compared to the rigid interpretation which looks at overlapping functions as an opportunity to violate procedural fairness.

Dr. Robert as well notes that nowadays, it is very common to find statutory provisions that expressly provide for the exclusion of certain procedures, especially many which have since time immemorial been linked to procedural justice.[44] This position is well endorsed by John Griffin who says that as time has evolved, administrative procedures are more novel and often fail to meet the rigid procedural fairness threshold.[45]This assertion gives room for the consideration that inasmuch as there exists a need to safeguard procedural fairness, the evolution of time means that many Statutes may well be off the mark on the rigid interpretation.

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[41] Atrill S, 'Who is the 'Fair Minded & Informed Observer'? Bias after Magill', *Cambridge Law Journal,* Vol 62, 2003, 279 & 289-<Who is the "Fair-Minded and Informed Observer"? Bias After Magill | The Cambridge Law Journal | Cambridge Core>-.
[42] Griffin J, 'Apprehended Bias in Australian Administrative Law', *Federal Law Review*, Vol 38, 355-<Apprehended Bias in Australian Administrative Law - John Griffiths, 2010 (sagepub.com)>-.
[43] Mbaluto J and Mutua H, 'Delving Deeper: Supreme Court Affirms Dual Enforcement and Investigating Mandates of the CMA', *Oraro and Co Advocates* -< Delving Deeper: Supreme Court Affirms Dual Enforcement and Investigatory Mandates of the Capital Markets Authority – Oraro & Company Advocates>-
[44] Robert S, 'Procedural Fairness- Indispensable to Justice?', 2.
[45] Griffin J, 'Apprehended Bias in Australian Administrative Law', 364.

Berrey et al. also give room for the expansion of the rigid view on justice, extending the view that justice and fairness is relative, and as such, is always dependent on the context and circumstances.[46] This necessitates a case to case analysis of whether an action is just or not with regards to the specific context. Brynard also suggests that procedural fairness needs to exists as a case-specific duty[47] and as a fair but different procedure.[48]

Brynard in his other article, also calls for an allowance for administrative leaders to depart from procedural rules based on a reasonable justification depending on the context and keeping in mind the objects of the empowering legislation.[49] This seeks to move into a way in which procedural fairness is viewed in accordance to a requisite balance against the efficiency of administrative bodies.

Rousseau advocates for a bi-furcated model which distinguishes the responsibilities carried out by the regulator within the Quebec territory in Canada.[50]

[46] Berrey E, Steve G, Laura B, 'Situated Justice: A contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation', *Law and Society Review,* Vol 46(1), 2012, 4-<Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation on JSTOR>-.
[47] Brynard J, 'The Duty to Act: A Flexible Approach to Procedural Fairness in Public Administration', 126.
[48] Brynard J, 'The Duty to Act: A Flexible Approach to Procedural Fairness in Public Administration', 133,139.
[49] Brynard J, 'Procedural Fairness to the Public as an Instrument to Enhance Public participation in Public Administration', *Administration Publica, Vol 19(4),* 2011, 111-<Administratio Publica 19(4) 2011 Procedurak fairness.pdf (unisa.ac.za)>-.
[50] Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières'*, Expert Panel on securities Regulations in Canada, 2008, 1.

1.8.3 Contribution

Scholarly work exists on the enforcement mandate of the CMA flowing from a historical analysis. However, no scholar has answered the question on the appropriateness of such interpretation as in *Popat* to the execution of the CMA's enforcement mandate. Also, the paper seeks to argue that better outcomes can be achieved through a holistic appreciation of the process as seen in *Brosseau v Securities Commission.*[51]

This study will, as a whole, contribute to the discussion on the balance between efficiency of administrative bodies such as CMA in Kenya and procedural justice. While previous studies in Kenya have focused on the nature of the enforcement of securities markets regulations by the CMA, this study will go a step further to assess whether the trade off between efficiency and procedural justice is justified. This analysis will be unique in as far as (I) it involves an analysis of the recent *Popat* decision in light of administrative enforcement unlike the works of Dr. Gakeri[52] and Okioga[53] which lament on the inadequate support of courts in developing capital markets, and (II) it analyzes the potential trade off between efficiency and procedural fairness and whether it is justified to neglect either.

[51] *Brosseau v Alberta Securities Exchange* (1989) Canadian Supreme Court 1 SCR 301.
[52] Gakeri J, 'Regulating Kenya's Securities Markets: An assessment of CMA's Enforcement Jurisprudence', *International Journal of Humanities and Social Sciences*, Volume 2 (No. 20), Special Issue, 2012, 289.-<Microsoft Word - 25.docx (ijhssnet.com).-
[53] Okioga C, 'The Capital markets Authority Effectiveness in Regulation of Financial Markets Perspectives from the Financial Sector Actors', *Australian Journal of Business and Management Research*, Volume 2 No. 11 (15-24), February 2013-<The Capital Market Authority Effectiveness in the Regulation of Financial Markets perspectives from the financial sector actors | Semantic Scholar>-.

1.9 Methodology

This study will consist of three parts: the first detailing the introduction to the overlapping nature of the functions of CMA and the *Popat* decision; the second dealing with whether the problem is eventually solved; the third dealing with the tradeoff made in sacrificing efficiency and lastly; the proposition on the best interpretation that balances procedural fairness and efficiency.

For the first chapter, the study will rely on a historical and doctrinal analysis on the position that the decision took. This will be done through relying on qualitative evidence from secondary sources of law such as books, articles, case law and reports. The study will also use primary sources such as the Constitution of Kenya (2010), the Capital Markets Act and the Fair Administrative Act.

The second part of the study will heavily rely on a doctrinal analysis on the effect of delegation, and whether it solves the anticipated problems. The study will rely on qualitative evidence from secondary sources of law such as books, articles, case law and reports.

The third part of the study will do a doctrinal analysis in favor of efficiency of the CMA and how it is harmed as a result of the decision. This will be done through relying on qualitative evidence from secondary sources of law such as books, articles, case law and reports. The study will also use primary sources such as the Constitution of Kenya (2010), the Capital Markets Act and the Fair Administrative Act.

The last two chapters of the study will rely on a comparative analyses to make a proposition of a preferred interpretation to balance the two concepts of efficiency and procedural fairness. It will rely on qualitative evidence from secondary sources of law such as books, articles, case law and reports. The study will also use primary sources from the comparable jurisdictions and see how they compare with our own.

1.10 Chapter Breakdown

The first chapter of this study shall be Chapter One. It puts together the background, research objectives and questions, conceptual framework, literature review, justification of the study, and chapter breakdown, among other details.

Chapter Two will assess whether the decision solves the problem of apprehension of bias. It will make the argument that Kenya has moved from the *Ernst and Young* position and endorses the position as seen in the *Al Nashir Popat*, which does not solve the problem.

Chapter Three will endeavour to prove a crucial part of the study's hypothesis - that adoption of the *Al Nashir Popat* interpretation neglects some aspects of the CMA's efficiency, in favour of strict procedural fairness. It will do this by assessing the CMA's enforcement mandate and how its efficiency is affected.

Chapter Four will assess how the Quebec territory in Canada has dealt with the problem of recurrent apprehension of bias.

Chapter Five will conclude and recommend the position that best ensures a proper balance between efficiency and procedural fairness.

CHAPTER TWO

2.0 THE RECURRENT PROBLEM OF BIAS

2.1 Introduction

This chapter analyzes the solution offered by the Supreme Court (the court) to the problem of apprehension of bias: the mandatory delegation of overlapping duties to third parties. It seeks to answer two significant questions: Whether the problem of apprehension of bias is indeed solved through delegation under Section 11A Capital Markets Act and, to what degree is it feasible to expect the CMA to successfully delegate its authority to third parties.

At the Supreme Court, the main issue was whether the CMA could be both the investigator and enforcer of capital markets infractions in Kenya.[54] By extension, the court analyzed whether by virtue of authorizing the overlapping mandates, Sections 11(3)(cc) & (h) of the Capital Markets Act led to a breach of the suspects' procedural rights and hence were unconstitutional. On one hand, the court acknowledged that for the capital markets to remain stable, they are heavily dependent on effective regulation and enforcement by the CMA. The court went as far as giving a historical account for the wide mandate of the CMA in punishing errant players.[55] On the other hand, they also acknowledged the procedural fairness aspect and its importance stemming from the Constitution of Kenya 2010.

The court concluded that the said sections were not unconstitutional per se but the exercise of the overlapping functions solely by the CMA was unconstitutional. This was because their performance could potentially lead to a reasonable apprehension of bias. The remedy offered by the court was for the CMA to mandatorily delegate authority to third parties through Section 11A Capital Markets Act to avoid the possibility of appearing biased .

While the ruling was considered a huge win for procedural fairness, several questions arise on whether indeed the contemplated delegation is enough to solve the tricky problem of apprehension of bias, and whether delegation is indeed a feasible solution if at all. This chapter hypothesizes that delegation under Section 11 is neither a viable solution nor is it feasible.

[54] *Al Nashir Popat & 7 others v CMA* (2020), para 11.
[55] *Al Nashir Popat & 7 others v CMA (2020)*, para 43.

2.2 The Regulator's Headache: Apprehension of Bias

The *Popat* appeal in the Supreme Court was the result of a litany of different suits against the regulator stemming from the apprehension of bias. Historically, some of the litigants who had moved to court to challenge the overlapping mandates of the CMA had done so as to oust the CMA of its powers and jurisdiction to prosecute the suspects.[56] This was a gambit well cornered in the *Ernst & Young LLP v CMA and another* case, where even before the CMA had exercised their overlapping mandates, an outcry on apprehension of bias by the petitioners was made to the High Court. Most suspects use the 'Get Out of Jail' escape route by claiming the apprehension of bias in CMA's overlapping mandates. The in-and-out of court processes makes the process tedious for the regulator, while also making it difficult for there to be continuity of cases.

2.2.1 Framing the issue: The Test of Apprehension of Bias

The test stems from the *nemo judex in cau sa sua debet esse* principle of natural justice where individuals have the right to an unbiased trial. It cautions against being a judge in a case where one has an interest involved or where one is a disputing party.[57] The test is that a 'fair-minded lay observer' having considered all material facts would reasonably apprehend that the decision maker might not be in an impartial mind.[58]

It seeks to achieve several objectives such as maintaining public confidence in the integrity of judicial processes, reducing the risk of erroneous decisions, promotion of efficient public decision making and acknowledgement of the interests of the party asserting apprehended bias.[59] The test largely ensures that justice is not only done, but also seen to be done.

The rule is a lower threshold of actual bias as it focuses on the existing perception of bias rather than actual bias.[60] This therefore requires a less heavy onus of proof as compared to actual bias[61]

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[56] *Chadwick Okumu v Capital Markets Authority*, Constitutional Petition No 510 of 2016.
[57] Ranjeeta S, 'Chapter 1'in Principle of Audi Alteram Partem in Administrative Function: Nepalese Case Laws, October 2012, 1, 3-<Principle of Audi Altrem Partem in Administrative Function: Neplease Case Laws by Ranjeeta Silwal :: SSRN>-.
[58] Griffiths J, 'Apprehended Bias in Australian Administrative Law', 353-<ORIGINALISM IN CONSTITUTIONAL INTERPRETATION (austlii.edu.au)>-.
[59] Griffiths J, 'Apprehended Bias in Australian Administrative Law', 354.
[60] 'Chapter 4' in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Office of the High Commissioner of Human Rights, United Nations, New York & Geneva, 2003, 137.
[61] 'Chapter 4' in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 137.

for which the onus must be distinctly made and proven.[62] The burden under apprehended bias requires for one to prove legitimate doubt based on their own apprehension of the facts.[63] This application of the test varies based on the context and information presented to the 'fair-minded lay observer'.[64] Therefore, not only is the required burden for apprehended bias low, but its application is also quite speculative and subjective.[65] According to Griffith in his analysis of Australian administrative decisions,[66] its inherent nature makes the rule very problematic and unpredictable.[67]

However, even then, there are known exceptions to the apprehension of bias rule. For example, in the *Ernst & Young LLP v CMA and another*,[68] the court noted that statutory authorization for overlapping functions is an exception to the apprehension of bias rule. This is because such administrative bodies were created for a variety of purposes, some of which overlap. Hence out of the necessity of the performance of the functions, as well as the avoidance of multiple bodies performing similar functions, overlapping duties for administrative bodies are a known exception. This is provided the decision maker does not act outside of their statutory mandate.

2.2.2 The Impact of the *Popat* Ruling on the Apprehension of Bias Test.

Per the exception in the *Ernst and Young* case,[69] if a certain degree of overlapping of functions is authorized by Statute, then to the extent authorized, it should override the apprehension of bias test. The Capital Markets Act provided for the exercise of the overlapping functions pursuant to Sections 11(3)(cc) & (h) of the Act. Therefore, to the extent authorized, the CMA ought not have been subjected to the apprehension of bias test. This position has been endorsed in the *Popat Court of Appeal Judgement,*[70] *Ernst & Young LLP v CMA and another, and* the Canadian

[62] Griffiths J, 'Apprehended Bias in Australian Administrative Law', 354.
[63] 'Chapter 4' in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 137
[64] Griffiths J, 'Apprehended Bias in Australian Administrative Law', 353.
[65] Griffiths J, 'Apprehended Bias in Australian Administrative Law', 353.
[66] Griffiths J, 'Apprehended Bias in Australian Administrative Law'.
[67] Griffiths J, 'Apprehended Bias in Australian Administrative Law',353.
[68] *Ernst & Young LLP v CMA and another* (2017) eKLR.
[69] *Ernst & Young LLP v CMA and another* (2017) eKLR.
[70] *Al Nashir Popat & 8 others v CMA* (2016), Court of Appeal.

Supreme Court's decision in *Brosseau v Alberta Securities Exchange Commission* where the commission's chairman was accused of apprehended bias.[71]

However, this was not the case in *Popat*. The ruling disregarded the general exception of the rule by failing to recognize the CMA as a statutory body authorized to partake in overlapping duties. The court applied the test without giving a justification on it overriding other competing narratives like efficient enforcement by the CMA. They ought to have justified why the exception needed to be disregarded, or whether there was an exercise of mandate beyond that authorized by the Capital Markets Act.

Popat does away with the exception to the rule for statutory bodies in a move that may yet open the CMA up for unnecessary litigation. This is because the CMA is no longer protected as a statutory body authorized to carry out overlapping functions. Thus, it opens the CMA up to multiple appeals by previously penalized market players to reverse rulings. Worse of all is that it exposes the regulator to a threshold of bias that is lower, more speculative, and more subjective.

Griffith and Simon Atrill share a similar concern, that perhaps many courts have applied the test too literally and detached from competing narratives as seen in Australia.[72] This might just be the case with the *Popat ruling* where little regard was given to the negative effect such a decision may have on the regulator.

2.3 Whether Delegation under Section 11A solves the Apprehension of Bias Problem

Having discussed the rocky nature of the apprehension of bias test, this section analyzes whether the blanket solution of delegation does in fact solve the problem of bias. The major hypothesis is that the inherent structure of delegation of functions under Section 11A Capital Markets Act is largely insignificant to deal with the nature of the apprehension of bias. This is because the structure of delegation cannot guarantee the delegate third party's independence and autonomy, and hence potentially vulnerable to attacks on the apprehension of bias test.

Firstly, Kenyan courts' jurisprudence on the delegation of authority by statutory bodies offers the CMA very little hope in solving bias. In the *Attorney General and another v Independent Police*

[71] *Brosseau v Alberta Securities Exchange* (1989) Canadian Supreme Court 1 SCR 301.
[72] Griffiths J, 'Apprehended Bias in Australian Administrative Law', 354.

Oversight Authority (IPOA) and another (2015),[73] the court sternly warned statutory administrative bodies against the complete delegation of authority to novel creatures. According to the above-mentioned decision, the court labeled such action as absconding of one's statutory responsibility and hence unacceptable.

The impact this has on the CMA would be that even if they delegate under Section 11A within some stages, some members of CMA would be required to be present anyway, or risk being seen as absconding their responsibility to novel entities. Already, the currently updated CMA's Investigation and Enforcement Manual alludes to the idea that in the very least, the Chief Executive Officer (CEO) remains present over the multiple functions.[74] This would mean that the CMA would still maintain a foot in the multiplicity of activities and hence, the allegations on likelihood of bias are unlikely to go away any time soon.

In the *Brosseau* case,[75] the performance of overlapping functions by the Security Commission's Chair solely led to several appeals in the name of apprehension of bias.[76] The *Osborne Committee*[77] also lamented that just the involvement of the Security Exchange Commission Chair in overlapping events has over time made a compelling case for apprehended bias.[78] This may be exacerbated due to the possibility of institutional and personal bias from the member(s) performing the overlapping duties, in this instance the CEO. Issues such as institutional loyalty may give suspects the impression that the cards are stacked against them when they appear for CMA hearings.[79] They could also claim apprehended bias from the risk that such a member of the tribunal feels highly passionate and committed to a particular policy simply because they took part in crafting.[80] To these unique problems, mandatory delegation under Section 11A has no answers.

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[73] *Attorney General and another v Independent Police Oversight Authority (IPOA) and another (2015).*
[74] *Capital Markets Authority Investigation and Enforcement Manual* (Revised 2020), 29.
[75] *Brosseau v Alberta Securities Exchange* (1989) Canadian Supreme Court 1 SCR 301.
[76] *Brosseau v Alberta Securities Exchange* (1989) Canadian Supreme Court 1 SCR 301.
[77] Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières, 7.*
[78] Osborne committee as in Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières.*
[79] Osborne Committee as in Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières.*
[80] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 31.

Secondly, according to Section 11A of the Act the CMA maintains discretion over who to delegate activities to. They still maintain autonomy to pick the prosecutor, judge, and jury. This means that it may still be argued that apprehended bias arises from the CMA's ability to pick third parties of their choosing to delegate to. This issue is further exacerbated when we assess the most probable source of remuneration for the third parties. The CMA remains to be the most probable source of remuneration for persons tasked with the delegation contemplated under Section 11A of the Act. The idea that the CMA picks the delegates and goes ahead to pay them locks out the perception of independence and impartiality of the third parties. This leaves a lot of leeway for claims of likelihood of bias by several litigants.

Lastly, in creating a competent tribunal, there needs to be so much balance and scrutiny as to the selection of the tribunal members. On the one hand, it requires people with expertise in capital markets issues[81] while on the other hand it requires neutral and unbiased people. The problem is that finding neutral capital markets regulation experts who have not worked in the capital markets industry is quite challenging. This is because, most experts end up plying their trade for various companies within the capital markets and hence risk being flagged as unneutral. This is crucial because it makes it more difficult for the CMA to be expected to find neutral third parties who are experts in the field.

When we consider that anyone, anywhere, may now access the capital markets thanks to the development of internet trading, it may potentially get worse. The harm arises from the possibility that their interactions with the capital markets space might have unintentionally shaped their opinions and approaches to certain players in the market. As a result, they might not be as impartial as expected and this opens room for further criticism of the regulator.

Therefore, having failed to solve the root problems of independence, it is quite difficult to see how the blanket solution of delegation may foster impartiality or solve the problem of likely bias.[82] If anything, there is a huge likelihood that mandatory delegation to third parties might exacerbate the claims on the apprehension of bias. The solution potentially leads us into a treadmill of desperate claims thrown around by litigants on bias.

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[81] The Capital Markets Authority Handbook briefly discusses the need for experienced workers.

[82] Ellis R, 'Tribunal Independence and Impartiality in Canada: How Real is it? Not Real by any Measure', *The Canadian Institute, 8th Annual Advanced Administrative Law & Practice Conference*, Ottawa, January 2009, 4-<ccat-ctac.org/wp-content/uploads/2020/03/19.Tribunalindependenceandimpartiality-howrealisit-Notrealbyanymeasure-October2008.pdf>-.

2.4 Practicality of Mandatory Delegation

This segment gives an assessment on the feasibility of mandatory delegation under Section 11A Capital Markets Act. The assessment on whether it is practical is virtually independent of whether it solves the problem of apprehended bias as argued in the previous segment.

The direct impact of the *Popat* ruling was that the CMA partially lost its discretion as under Section 11A Capital Markets Act to decide whether to delegate to third parties. In order to deal with the problem of apprehended bias, the court asked the regulator to mandatorily delegate some overlapping functions to third parties. The Supreme Court expressed heavy skepticism of the fact that different bodies could perform the different functions of the CMA separately. In paragraph fifty-four of their ruling, the court stated that fragmenting the discharge of functions among different bodies would in fact mean that disputes would drag on for eternity.[83] It seems a bit unclear then, on how CMA was expected to forge a way forward despite the difficulty in delegation. In attempting to fill in the gaps on what CMA was expected to do, we in fact see that the process of delegating authority is marred with many challenges that hinder CMA's administrative mandate.

Firstly, delegation of authority means transferring duties to a third party.[84] In this instance, it would look like CMA surrendering a fraction of its mandate such as investigating, holding inquiries, or administering sanctions to a different and independent third party. It follows that CMA would then lose a vital part of its procedural independence and its success would be contingent on the third party's efficacy. Any delay or inconvenience on the part of the delegated body or persons would see a domino effect on the part of solving issues by the CMA. The handling of capital markets disputes would be dependent on the body or persons' capabilities, time allocated into solving the disputes, available resources, and their willingness to effectively solve the disputes. The expectation might make matters worse because assisting CMA is not exactly a primary, statutory or civic duty to the delegates. Therefore, such a delegated duty might be regarded as of secondary urgency vis-à-vis the delegates' own duties. Partially robbing the

[83] *Al Nashir Popat & 7 others v CMA* (2020), para 54.
[84] Oviawe E, 'Delegation: Benefits, Limitations and Why Managers Find it Difficult to Delegate', *Paper Presentation at the Nasarawa State University*, Nigeria, January 2015, 2-<(PDF) Delegation: Benefits, Limitations & Why Managers Find It Difficult To Delegate | Edosa Gaxkin Oviawe - Academia.edu>-.

CMA of its procedural independence robs them of the control they yield in the administrative process. This could potentially mean further delays in handling the disputes.

The partial loss of procedural independence in the capital markets industry is in fact, not a completely novel problem. As earlier mentioned, the Executive has had heavy influence over the actions of the CMA in the past. Okioga in his article paints an even better situation where he reflects on the Kenya Anti-Corruption Commission (KACC) and its loss of independence.[85] He concludes that KACC, a body that was supposed to be independent, ended up too dependent on other bodies such as the Director of Public Prosecutions (DPP) to effectively carry out its mandate. As a result, they became ineffective in their main mandate: to prosecute corrupt suspects.[86] The loss of the CMA's procedural independence is therefore a problem that may go deeper to affect their enforcement mandate.

Secondly, the capital markets industry is one that is heavily nuanced and technical. This is because, apart from the various products offered on the market, there exists an increased level of sophistication of financial markets such as the advent of cryptocurrencies, as well as international investment strategies- all which require specialized know-how which third party entities may lack.[87] There exists an expectation that statutory administrative bodies are constituted by persons who are specifically trained and knowledgeable in the respective field.[88] This ensures that any dispute arising is heard by persons that are uniquely qualified to handle the issues at hand. As such, it requires individuals who fully understand the dynamics of the industry. This requirement filters out many potential candidates, as it means a smaller pool of individuals may in fact qualify for such delegation.[89]

Lastly, potential third parties may lack similar incentives to those of the regulator. For there to be efficacious enforcement, there needs to be the maintenance of the regulator's incentives such as

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[85] Okioga C, 'The Capital Markets Authority Effectiveness in the Regulation of the Financial Markets, Perspectives from the Financial Sector Actors', 16.
[86] Okioga C, 'The Capital Markets Authority Effectiveness in the Regulation of the Financial Markets, Perspectives from the Financial Sector Actors', 16.
[87] Delegation of Functions, Report of the Technical Committee of the International Organisation of Security Commissions, OICV-IOSCO, December 2000, 2-<iosco.org/library/pubdocs/pdf/IOSCOPD113.pdf>-.
[88] Odera C & Radhika A, 'The Way to Go: Exhaustion of Alternative Remedies and Exceptional Circumstances in Judicial Review', *Oraro and Oraro Newsletter,* Issue 13, May 2021,13-<Way to Go: Exhaustion of Alternative Remedies and Exceptional Circumstances in Judicial Review - Oraro & Company Advocates>-.
[89] Delegation of Functions, Report of the Technical Committee of the International Organisation of Security Commissions, 3.

prevention of systemic risk and protection of investors in all aspects of the administrative process. It is dangerous to have people without similar incentives doing this as they may create a potential to undercut the policies developed by the CMA.[90] Also, individuals with similar incentives as the regulator can adequately foresee the implications of the decisions they make as compared to their counterparts without.[91] Limiting such presence could in fact dilute the CMA's interests within these administrative processes.

2.5 Conclusion

This chapter has made an attempt to critique the problem that has haunted CMA in litigation: apprehension of bias. To analyze whether the delegation of duties under Section 11A Capital Markets Act is appropriate to solve the problem, the chapter questions the nature of the apprehension of bias rule. The chapter argues that it is difficult to solve the problem due to the lack of independence and autonomy that comes with the delegation under Section 11A of the Act. Finally, the chapter lays the analysis that delegation may be impractical for the CMA due to the specialized nature of its mandate. Without a deep scrutiny of the nature of the apprehension of bias rule, a blanket solution to the problem may be largely ineffective. What is worse is that the regulator is left exposed and at the mercy of notorious suspects who may still move to court to claim apprehension of bias due to the ease at which one can prove it.[92]

[90] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 8
[91] Odera C & Radhika A, 'The Way to Go: Exhaustion of Alternative Remedies and Exceptional Circumstances in Judicial Review', 13.
[92] Griffiths J, 'Apprehended Bias in Australian Administrative Law', 354.

CHAPTER THREE

3.0 THE POTENTIAL DOMINO EFFECT ON THE CAPITAL MARKETS LANDSCAPE

3.1 Introduction

According to Jeremy Bentham's utilitarianism theory, the object of the law is to maximize the happiness for the majority of people within a given society.[93] The law exists as an instrument for stability and societal reforms to aid the greatest number of people.[94] As such, legal rules and decisions must always be weighed up against the superior principle of utility to evaluate their societal value.[95] The *Popat* decision is no different: there is the need to weigh it against the utilitarian principle.

To this end, this chapter shall analyze the potential impacts the decision has on various stakeholders. This section hypothesizes that the increase in barriers on the regulator's administrative enforcement toolkit acts as a hindrance that negatively affects the stability of the capital markets in Kenya. Similarly, it may be that the (potential) investors suffer while (potential) errant players win as a result of the decision.

3.2 On the Regulator's Efficiency

Capital markets play an incredible role in fostering economic growth and financial deepening of an economy.[96] They provide a mechanism for asset pricing, transferring of risk, and diversification of risk exposure therefore enabling companies to raise funds.[97] As such, the role that a stable capital markets regime plays cannot be overemphasized.

Similarly, it is a well acknowledged truism that the existence of a robust, efficient, and ebullient capital market heavily relies on proper enforcement of the regulatory framework. Research has

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[93] Pradeep M, 'The Utilitarian Theory of Law: An Analysis', April 2018, 225-<(PDF) The Utilitarian Theory of Law-An Analysis (researchgate.net)>-.
[94] Pradeep M, 'The Utilitarian Theory of Law: An Analysis', 225.
[95] Pradeep M, 'The Utilitarian Theory of Law: An Analysis', 229.
[96] Ana C, Elliott J, 'The Challenges of Enforcement in Securities Markets: Mission Impossible', IMF Working Paper, NP/09/168, August 2009, 4-<The Challenge of Enforcement in Securities Markets: Mission Impossible? by Ana Carvajal, Jennifer E. Elliott :: SSRN>-.
[97] Ana C, Elliott J, 'IMF Study Points to Gaps in Securities Markets Regulation', IMF Survey, February 4 2008-<IMF Survey: IMF Study Points to Gaps in Securities Market Regulation>-.

over time proven that stricter implementation and enforcement of capital market regulations by the market regulator results in positive outcomes such as larger liquidity effects.[98] On the flip, the inability of capital markets regulators to enforce rules and regulations derails the healthy growth of such markets.[99] Therefore for a country to maintain stability of its capital market, it needs to invest in having effective regulatory and enforcement mechanisms that can prevent and react to inconveniences caused in the market.[100]

Securities regulators such as the CMA oversee the functioning of the market, playing a key role in creating a resilient and integral financial system.[101] They act as society's watchdog to manage and mitigate risks that could threaten the capital markets.[102] At a time when the retail investment in capital market products has tremendously increased,[103] the regulator plays the role of deterring bad behavior and improper practices.[104] This is especially so because the core objectives of securities regulation center around protecting investors and preventing systemic risks.[105]

3.2.1 **CMA's Enforcement Mandate**

When a dispute arises, the CMA's enforcement toolkit entails both criminal and administrative action against errant players. The criminal action entails investigation by the Capital Markets Fraud Unit before charging the suspect for a crime and arraigning them in court. This mostly happens where there is suspicion of crimes such as insider trading. However, scholars have offered much criticism to the criminal ambit due to the longevity of the criminal proceedings, lack of capital markets nuance by prosecutors and the high legal burden of proof.[106]

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[98] Hans B, Luzi H, Christian L, 'Capital Markets Effects of Securities regulation: The Role of implementation and enforcement', Working Paper 16737, National Bureau of Economic Research, Cambridge, January 2011, 35-<Capital-Market Effects of Securities Regulation: Prior Conditions, Implementation, and Enforcement | NBER>-
[99] Ana C, Elliott J, 'IMF Study Points to Gaps in Securities Markets Regulation'.
[100] Gakeri J, 'Regulating Kenya's Securities Markets: An Assessment of CMA's Enforcement Jurisprudence', 265.
[101] Ross V, 'The Major Challenges facing Securities Regulators', European Securities and Markets Authority, Speech by ESMA Chair, 24 February 2022, 1-<esma71-99-158_eurofi_speech_-_verena_ross_-_february_2022.pdf (europa.eu)>-.
[102] Ross V, 'The Major Challenges facing Securities Regulators', European Securities and Markets Authority, 1.
[103] Enhancing investor protection, KPMG - site
[104] Ross V, 'The Major Challenges facing Securities Regulators', European Securities and Markets Authority, 3.
[105] Delegation of Functions, Report of the Technical Committee of the International Organisation of Security Commissions, 2.
[106] Kotonya A, 'Combating Insider Trading in Kenya's Capital Markets: Challenges and Opportunities for Reform', 41, 94.

As a result, the CMA often opts for its administrative process as the most common and effective way of enforcing its regulations.[107] The administrative process stems from Section 11(3)(cc) and (h) Capital Markets Act which empowers the Authority to hold inquiries and impose sanctions where necessary. Their inquisitorial mandate exists concurrently with their adjudicative and enforcement mandates.[108]

3.2.2 The Negative Impact on CMA's Efficiency

The mandatory delegation of duties solution as proposed in the *Popat* decision generally reduces the CMA's efficiency in administrative enforcement.[109] This is because such delegation under Section 11A Capital Markets Act potentially increases the structural barriers as well as burdens of the CMA and hence weakening their capacity to act. This happens on two structural levels: It increases the quantity of resources to be spent by the CMA and it lessens the CMA's ability to respond to urgent matters.

Delegation under Section 11A means the introduction of third parties to deal with issues that CMA would ordinarily have done. This means that CMA must spend more resources such as time and money continuously paying the delegates for their services. This is stunning as according to Gakeri's article, the CMA deals with between thirty-seven to three hundred and seven infractions every year.[110] This would mean more money spent every year simply on delegation to third parties, for example providing resources for the delegates or allowances.

Again, it means that more time may be taken to deal with the hundreds of administrative cases for the CMA. This is because, as previously argued, they depend on the availability, willingness and efficiency of other bodies. As a result, they are prone to delays in the process of delegating, getting to a decision and appeals. The Supreme Court in the *Popat* decision conceded to the possibility that such division might mean 'dragging of cases for years.'[111] This means that items

[107] Muhongo S, 'Combating Insider Trading in Securities markets: A review of Kenya's Legal Framework', Published, Strathmore University, Masters Thesis, Nairobi, 2021, 6.
[108] Mbaluto J & Mwongeli H, 'Delving Deeper: Supreme Court Affirms the Dual Enforcement and Investigatory Mandates of the CMA', 18.
[109] Delegation of Functions, Report of the Technical Committee of the International Organisation of Security Commissions, 4.
[110] Gakeri J, 'Regulating Kenya's Securities Markets: An Assessment of CMA's Enforcement Jurisprudence', 277.
[111] Para 54 *Al Nashir Popat and 7 others V CMA*(2020) eKLR.

on the CMA's high priority list such as those that require timely deterrence may end up being delayed, sacrificing investor confidence.[112] Implicitly too, more time taken on solving disputes means that the regulator's ability to quickly respond to urgent matters is hindered. This is bad because an effective regulator must always have the capacity and tools to respond in a timely fashion.[113]

The impact of the reduction of the CMA's efficiency is harmful to the CMA's enforcement mandate. This is because public affairs must always be conducted effectively, expeditiously, and inexpensively or else risk being unacceptable within a society.[114] This is why the Supreme Court in the *Popat* decision conceded that efficiency is very vital in the operation of securities markets.[115]

What the afore-mentioned factors such as the requirement for more resources and a lessened ability to respond urgently do, is that they make it extremely burdensome for the regulator on a cost-benefit analysis of whether to pursue capital markets suspects. This may affect the willingness of the regulator to pursue as many cases as possible, and hence potentially hinder access to justice. The bureaucratic and rigid process for the regulator denies investors an efficient mechanism to solve their issues contrary to Article 47 Constitution of Kenya 2010.[116]

Inherently, this limits the capacity of the regulator to manage and mitigate risks that threaten the functioning of the market.[117] Therefore, there is an imperative need to strike a balance between procedural fairness and administrative effectiveness[118] to avoid weakening the regulator.

3.3 Impact on (Potential) Errant Market Players

The biggest beneficiaries of the *Popat* decision are, perhaps, errant market players. Most suspects of errant market play have for far too long been allowed to use technicalities to escape

[112] According to the *Capital Markets Authority Investigation and Enforcement Manual* (Revised 2020), it is usually 6 months.
[113] Ana C, Elliott J, 'The Challenges of Enforcement in Securities Markets: Mission Impossible', 8.
[114] Franceschi L, 'The African Human Rights Judicial System: A proposal for Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective', Published, Doctoral Thesis, University of Navarra, Pamplona, 2011, 16.
[115] Para 51 *Al Nashir Popat and 7 others V CMA*(2020) eKLR.
[116] Article 47, *Constitution of Kenya* 2010.
[117] Ross V, 'The Major Challenges facing Securities Regulators', European Securities and Markets Authority, 1.
[118] Franceschi L and Lumumba P, *The Constitution of Kenya 2010: An Introductory Commentary*, 220.

the law.[119] Sadly, their attempt to escape the CMA's grasp continues to bear much fruit. They benefit from the *Popat* case in two major ways: It principally adds a layer of protection to suspected errant players and it increases the barriers for the CMA's enforcement meaning the regulator's reluctance to pursue suspects.

Firstly, the *Popat* decision potentially gives an additional mechanism of protection to suspected wrongdoers at the expense of the regulator and victim investors. This arises from the tricky nature of the apprehension of bias rule which seems to protect suspects more than all else. As earlier discussed, the nature of apprehended bias is quite speculative and demanding for administrative decision makers. This occurs as a result of the low burden of proof required for the suspect to prove apprehension of bias. The *Popat* decision removes the exception as in the *Ernst and Young* decision[120] and hence subjecting the regulator to the low threshold of bias. The impact of this is that it gives suspects an easier way out through invoking the apprehension of bias rule. As argued in the initial chapter, the solution by the court does not solve the problem of apprehended bias therefore leading to a treadmill of chaos that can be weaponized by the (potential) suspects.

This norm helps such suspects to circumvent the grip of the CMA. However, this goes against Article 159 of the Constitution of Kenya which asks for courts' tolerance on procedural issues so as to enable substantive justice.[121] In some instances, this has allowed for suspects to completely escape without a substantive hearing by the CMA based on the technicalities. For example, in the *Chadwick Okumu v CMA* case,[122] the suspect was allowed to avoid CMA's substantive hearings due to the apprehension of bias.

Lastly, the limited capacity and efficiency of CMA to enforce hearings and sanctions means a win for rogue market players. This is because the grip of the CMA is reduced due to the increase in rigidity in their processes. On the flip, suspects have more protection working in their favor. This may impact deterrence in the market as potentially rogue players are no longer worried about punishment due to CMA's inability to punish corporate scandals.[123]

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[119] *Chadwick Okumu v Capital Markets Authority*, Constitutional Petition No 510 of 2016.
[120] *Ernst & Young LLP v CMA and another* (2017) eKLR.
[121] Article 159 *Constitution of Kenya, 2010.*
[122] *Chadwick Okumu v Capital Markets Authority*, Constitutional Petition No 510 of 2016.
[123] Okioga C, 'The Capital markets Authority Effectiveness in Regulation of Financial Markets Perspectives from the Financial Sector Actors', 24.

3.4 Impact on (potential) investors

"An effective enforcement regime is the bedrock of investor protection and the confidence required in the capital markets. And the effectiveness of the regulatory scheme lies upon the nature and scope of enforcement tools granted to the regulator." (The Supreme Court of Kenya in the *Al Nashir Popat & others v CMA* case*)*[124]

Kenya's capital markets have always been faced with multiple challenges such as illegal intermediaries,[125] insider trading and market manipulation.[126] These malfeasances within the market heavily discourage the participation of investors due to the possibility that they may lose their capital.[127] Every year, the CMA deals with up to 300 infractions in the capital markets in a bid to punish errant players.[128] Such effective enforcement is argued to be the pillar to instilling investor confidence in the market.[129]

The perception that the regulator may not be able to effectively protect the investors causes shock waves within the market.[130] For example, a decrease in the regulator's enforcement capability in the market may lead to more investors feeling unsafe to invest as the regulator has purportedly lost control of the market. Depending on the overall impact of the challenge on the market, demand and supply is often negatively disrupted.

The efficiency at which the CMA can deal with matters brought before it effectively and expeditiously is what consumers look out for while assessing the risks of investing.[131] Therefore, the CMA's inability to expeditiously solve disputes on time, while also giving principal priority to the suspects makes the CMA look overwhelmed in the discharge of its duties. Thus, there is no promise that investors will be able to recoup their losses or receive justice in the event of a malfeasance.

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[124] Para 40 *Al Nashir Popat and 7 others v CMA*(2020) eKLR.
[125] Para 43 *Al Nashir Popat and 7 others v CMA*(2020) eKLR.
[126] Mbaluto J, 'Tightening Loose Ends: CMA's Power and Role in Combating Insider Trading', 6.
[127] Wanyama P, 'Understanding the Kenya's Capital Market: Bridging the Gap between the Investor and the Security Dealer', February 2007, 1-<UNDERSTANDING KENYA'S CAPITAL MARKETS: BRIDGING THE GAP BETWEEN THE INVESTOR AND THE SECURITY DEALERS (manyongewanyama.com)>-.
[128] Gakeri J, 'Regulating Kenya's Securities Markets: An assessment of CMA's Enforcement Jurisprudence', 277.
[129] Para 40 *Al Nashir Popat and 7 others V CMA*(2020) eKLR.
[130] Wanyama P, 'Understanding the Kenya's Capital Market: Bridging the Gap between the Investor and the Security Dealer', 1.
[131] Gakeri J, 'Regulating Kenya's Securities Markets: An assessment of CMA's Enforcement Jurisprudence', 266.

Further, the retail participation in investment products is rapidly increasing[132] and becoming more accessible to the *common mwananchi* due to technology. More people are also investing in other financial instruments such as crypto assets[133] due to increased advertising gimmicks by online influencers and the *Fear of Missing Out (FOMO).*[134] This means that there is an increased likelihood of desperate and vulnerable individuals being duped by scammers online or failing to access crucial information. IOSCO has often called for the protection of such vulnerable consumers from fraud as a pillar to maintaining trust and confidence in the market.[135]

Such a long time taken to handle cases would reduce the confidence that current investors have in the market fostering their exit. Similarly, for those on the outside their trust would be prematurely lost due to the perceived lack of capacity to expeditiously deal with capital market infractions in time. Truly, as Gakeri opines in his article,[136]effective regulation and enforcement is the foundation of confidence in the capital markets.

3.5 Conclusion

As earlier mentioned, the utilitarian scale may always be employed to weigh the effects that a law or policy may have on various stakeholders. In this instance, the *Popat* decision could potentially be harmful to various actors within the capital markets landscape. This is because of the tradeoff made between procedural fairness and efficiency which leaves out the regulator's major principle of investor protection.

In conclusion, the delegation of duties by a securities regulator such as the CMA must never be done in a way that defeats the purpose of effective regulation.[137] This goes a long way to affect how errant players behave, as well as potential investors' entry into the capital markets landscape.

[132] 'Enhancing investor protection', KPMG -<Enhancing investor protection - KPMG Global>-.
[133] Ross V, 'The Major Challenges facing Securities Regulators', European Securities and Markets Authority, 3.
[134] Ross V, 'The Major Challenges facing Securities Regulators', European Securities and Markets Authority, 3.
[135]'Enhancing investor protection', KPMG -<Enhancing investor protection - KPMG Global>-.
[136] Gakeri J, 'Regulating Kenya's Securities Markets: An assessment of CMA's Enforcement Jurisprudence', 265.
[137] Delegation of Functions, Report of the Technical Committee of the International Organisation of Security Commissions, 1, 7.

CHAPTER FOUR

4.0 COMPARATIVE STUDY: QUÉBEC'S BI-FURCATED MODEL

4.1 Introduction

This chapter focuses on comparative study and analysis. The chapter investigates how Québec has been able to effectively deal with the recurring problem of apprehension of bias differently from other regions in Canada and the world.

The rationale for using Québec is twofold. Firstly, Canada's Québec territory presents the perfect case study because it has had similar problems to those that Kenya's CMA is facing with regards to the problem of apprehension of bias. Not only have they been able to solve the problem, but they have also done so without jeopardizing various stakeholders' interests such as efficiency. Secondly, the solution proposed came off the back of Québec undergoing major transformative changes to administrative justice like Kenya. Québec's *Act Respecting Administrative Justice*[138] in 1996 engineered the shift to a heavy regard of administrative justice. This is similar to Kenya's *Fair Administrative Action Act* of 2015[139] which equally seeks to transform the Kenyan administrative justice landscape.

4.2 Québec

4.2.1 Historical Background of Administrative Enforcement in Québec

Québec is one of the thirteen territories and provinces in Canada.[140] Out of all these regions, Québec stands out in a few ways. For example, while the legal system in most of the Canadian provinces directly derives from the English common law system, Québec's legal system is an exception. Its system is heavily borrowed from the French civil law and influenced by the legal development of France. This is because of the French colonization of Canada in the period before 1760 before the British Conquest thereafter.[141] Most of the French settlers within this region at the time insisted on maintaining their French heritage unlike the rest of Canada which

[138] *Act Respecting Administrative Justice*, Chapter 54 of 1996. (Assented on 16 December 1996.)
[139] *Fair Administrative Action Act*, No. 4 of 2015.
[140] Adebayo D, 'Overview of the Legal System of Québec', April 2020, 2-<(PDF) Overview of The Legal System of Quebec (researchgate.net)>-.
[141] Adebayo D, 'Overview of the Legal System of Québec', 2.

had opted to adopt British common law and culture.[142] They have a separate Civil Code and Code of Civil Procedure. Many have attributed this difference in legal systems to the advent of federalism in Canada in 1867.[143] This meant that provincial governments could adopt their own laws and policies within their areas of exclusive jurisdiction.[144] Therefore, Québec was permitted to maintain its French heritage including culture and legal system in matters of private law.[145]

In 1996, Québec pursued a sweeping reform in its system of administrative justice that significantly changed their system's architecture.[146] This reform was instituted as a result of the *Act Respecting Administrative Justice* assented into in 1996[147] which established the *Administrative Tribunal de Québec*[148] together with the requirement that all administrative bodies conduct themselves impartially.[149] The aim of the Act was to improve public administration in Québec through harmonizing the procedures of administrative agencies in Québec.[150] This meant that yet again, Québec stood out from the rest of Canada, being the only province that constitutionally[151] and through the Act required independence and impartiality of administrative bodies.

This bold move was followed by a radical and progressive reform in the regulation of its financial services in 2002.[152] The Québec government established a task force on securities regulation to review the regulatory structure of their financial sector to improve its efficiency and streamline their administrative burden.[153] The task force observed that the major problem of administrative bodies performing overlapping functions was that they lack the guarantee of

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[142] Adebayo D, 'Overview of the Legal System of Québec', 2 & 4.
[143] Morin M, 'An Introduction to the Legal System of Québec written for a Diplomat,' 101 -<2021CanLIIDocs13851.pdf>-
[144] Adebayo D, 'Overview of the Legal System of Québec', April 2020, 2 & 4.
[145] Morin M, 'An Introduction to the Legal System of Québec written for a Diplomat, 101.
[146] Ellis R, 'Tribunal Independence and Impartiality in Canada: How Real is it? Not Real by any Measure', *The Canadian Institute, 8th Annual Advanced Administrative Law & Practice Conference*, 1.
[147] *Act Respecting Administrative Justice*, Chapter 54 of 1996.
[148] Title II, Chapter 1, *Act Respecting Administrative Justice*, Chapter 54 of 1996.
[149] Title I, Chapter II, Section 9, *Act Respecting Administrative Justice*, Chapter 54 of 1996.
[150] Houle F, 'A Brief Historical Account of the Reforms to the Administrative Justice System in the Province of Quebec', 2-<Microsoft Word - FinalHistoricalaccountTAQ-Toronto 20Dec-20081.doc (soar.on.ca)>-.
[151] Charter of Human Rights and Freedoms, RSQc C-12,5.23.
[152] Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 1
[153] Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 9.

impartiality and independence.[154] They then recommended a separation of regulatory and adjudicative functions.[155] Thus, through their *Securities Act,* they created a system of administration that is widely referred to as the 'bi-furcated' model.[156]

4.2.2 Québec's Administrative Enforcement: Bi-furcated Model

The Canadian Securities Exchanges and provincial security regulators in Canada, just like the Kenyan Capital Markets Authority, have traditionally maintained their structures as multifunctional administrative bodies.[157] This has seen them perform regulatory, investigative, prosecutorial, and adjudicative functions altogether.[158] Such performance of the multiple overlapping functions has invited criticism from various actors due to the appearance of bias and lack of impartiality.[159]

After the radical administrative changes in Québec, they switched from the structure to the 'bi-furcated' or external separation model. This is a structure that establishes a parallel tribunal to perform the adjudicative role while a separate institution performs the regulatory function.[160] This happened through the creation of the *Autorité des Marchés Financiers (*AMF*)* whose mandate lies in being the primary administrator and supervisor for all laws related to Québec's financial services sector.[161] Similarly, they established the *Bureau de decision of de revision en valeurs mobiliéres (*Bureau). Their mandate was to perform the adjudicatory roles with powers under their Securities Act.[162] Therefore, the Bureau became an independent administrative tribunal exercising the adjudicatory role specifically under securities.

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[154] Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 13.
[155] Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 13.
[156] Rousseau S, 'The Quebec Experience with an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 13.
[157] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 1.
[158] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 1.
[159] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 6.
[160] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 13.
[161] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 3.
[162] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 3.

This solution has ever since earned lots of respect due to its efficiency in removing the administrative burden that had caused securities regulators a headache.

4.2.2.1 **Structure**

The Bureau has six members consisting of a chair, vice-chair, and other members, all who are appointed by the Québec government on a full-time basis. While there is currently no fixed statutory requirement for the position, the current members of the Bureau were picked from a pool of practitioners admitted to the Québec Bar and have much experience in matters of securities and regulation. They all serve for five years each with security over their tenure. The members of the Bureau are treated to be distinct from the Bureau itself, offering them immunity from prosecution in the course of their duties.[163]

The Chair of the Bureau assigns, controls and coordinates the flow of work, assisted by the Vice-chair. Generally, there exists two subdivisions: Resource Management, and the Tribunal and Registry Management. The latter partakes in planning, organizing, and managing information, human, financial and material resources for the Bureau. The former engages in receiving and processing applications for hearing, providing the hearing schedules and providing access to registered documents. It is led by the *Secrétariat Général* in tandem with the Legal Affairs Director.[164]

Remuneration for the members of the Bureau as well as employment benefits and pension plans are determined by the Québec government. The Chair submits their annual budget to the finance minister who seeks the government's approval. However, the government does not directly fund the Bureau through the consolidated fund, except in exceptional circumstances. They are financed through sums paid by the AMF in conditions agreed by the government, as well as sums collected by way of fees, tariffs of duties and other financial penalties imposed by the Bureau to errant players.[165]

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[163] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 22.
[164] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 12.
[165] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 15.

4.2.2.2 **Efficiency**

While some may say that Québec was simply a laboratory for the bi-furcated model, it has borne so much success in improving the AMF's efficiency.[166] Research in Québec has shown that the decisions of the Bureau are rarely appealed. In fact, out of the 90 decisions rendered by the Bureau between February 1, 2004, and January 30, 2008, only 5 were appealed in the Court of Québec.[167] Similarly, the average time taken to deal with cases has reduced from four years to less than a year despite the large number of cases prosecuted.[168] This shows how much of a success story Québec's bi-furcated model has been. The nuance behind success, one might argue, is multiple fold.

Firstly, it deals perfectly well with the major problem of apprehension of bias. This is because there is decreased reliance on a single individual partaking in overlapping functions. Instead, entirely different institutions are spearheading the different processes therefore mitigating the risk of apprehended impartiality. As a matter of fact, even the physical locations of the AMF and the Bureau are significantly different. Therefore, it seems impossible that a well-informed observer viewing the matter practically would perceive a reasonable apprehension of bias. The biggest impact stemming from this is that the AMF has an easier path to implementation of its policies as there are little delays due to the lack of appeals.

Again, both the AMF and the Bureau would have the required knowledge in dealing with complex securities issues. This is because from both sides, experts exist to perform the regulatory and adjudicatory roles. Similarly, the Bureau has been seen to be responsive to the regulatory and enforcement issues raised by the regulator. Therefore, it also shares the main goal as the AMF, to protect investors.

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[166] 'Single Regulator: A Needless Proposal' Autorite des Marches Financiers, Brief submitted to the expert panel on Securities Regulation, July 2008, 35-<Memoire-commission-unique-07-08_ang.pdf (lautorite.qc.ca)>-.
[167] Rousseau S, 'The Quebec Experience With an Independent Administrative Tribunal Specialized in Securities: A study of the *Bureau de decision of de révision en valeurs mobilières*, 26.
[168] 'Single Regulator: A Needless Proposal' Autorite des Marches Financiers, 36.

4.3 Conclusion

The bi-furcated system in Québec was established to deal with the root problem of apprehension of bias which led many litigants into feeling like the administrative hearing process was marred with injustices. The system came off the back of a few radical transformations within the territory of Québec, most notably the *Act Respecting Administrative Justice.* The creation of the AMF and the Bureau has immensely changed the securities regulation landscape due to the improvement in efficiency of both administration and enforcement. The reduction in the dependence on individuals to perform overlapping roles as well as increase in autonomy have led to a reduction in cases of apprehension of bias and appeals. Therefore, the Québec laboratory has indeed solved a significant crisis.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The right to a fair trial is a right entrenched under the Constitution of Kenya. Similar to the right to fair administrative action, it entails a recognition that the key tenets of fair hearing are independence and impartiality.[169] This right under the Constitution was conceived during the Bomas Draft[170] as a response to public outcry on graft, incompetence and unfairness in the public service arena.[171] Therefore, there existed the urgent need to ensure that both judicial and administrative action was just and fair thus preventing tyranny of its subjects.[172]

The International Covenant on Civil and Political Rights (ICCPR) too requires the right to fair hearing for all persons with the assurance of independence and impartiality being very key.[173] The Human Rights Committee has held that this right is in fact absolute, and hence without exception.[174] Therefore, the right to a fair hearing has always been a key right not only during judicial processes, but also in administrative hearings.[175]

However, Kenya seems to find itself in a uniquely tough situation, where the application of this right in some instances has hindered access to justice. Specific to this paper has been the case study of the Capital Markets Authority (CMA). The rigid requirement of independence and impartiality in their administrative proceedings has meant a hindrance in their efficiency in enforcement. This is because they have often been sued by numerous suspects for lack of impartiality and independence due to the performance of multiple conflicting roles.

The *Al Nashir Popat* decision was only recently decided in favor of litigants' claim of procedural fairness. This decision applied the low threshold of proving bias against the regulator and hence putting the CMA at the risk of further litigation. Furthermore, the solution offered by the court

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[169] Article 47 & 50(1) *Constitution of Kenya* 2010.
[170] Article 74 *Bomas Draft Constitution*, 2004.
[171] Franceschi L and Lumumba P, 'The Constitution of Kenya 2010: An introductory commentary', 218. This was based on the Constitution of Kenya Review Commission's (CKRC) report on the views of the public.
[172] Franceschi L and Lumumba P, 'The Constitution of Kenya 2010: An introductory commentary', 218.
[173] 'Chapter 4' in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 118.
[174] 'Chapter 4' in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 118.
[175] Article 47 & 50(1) *Constitution of Kenya* 2010.

was to mandatorily delegate to third parties under Section 11A Capital Markets Act. However, this seems to be more harmful than helpful for the CMA as argued in the second chapter.

Firstly, delegation under Section 11A does not fully solve the problem of apprehension of bias. This is because it still entrenches a lack of independence between the prosecutor and the jury. This is seen when the CMA is expected to foot the costs of the third parties, while also maintaining some member(s) of the CMA in the process of adjudication. This means that the claims of lack of impartiality are unlikely to go away soon.

Furthermore, delegation appears to be impractical for the CMA. This is because handing out some aspects of their procedures makes them dependent on the third party and hence hindering their own ability to work effectively. Again, the markets' technicality makes it difficult for the CMA to source third parties spontaneously. Even for the experts who may be outsourced, there remains several doubts on whether their involvement in the capital market space has informed their opinions and hence making them partial in some issues.

The third chapter weighs the decision based on a utilitarian perspective: the most happiness for the largest number of people. The discussion assessed the contribution of the *Popat* decision to the CMA's efficiency, (potential) investors and errant market players. The regulator is most impacted by the solution given in the decision. This is because more resources such as time and money need to be invested as well as a high dependence on third parties. This overall means the increase of structural burdens that hinder efficiency. On (potential) errant market players, the increase in the regulator's burdens makes it easier to escape justice- a phenomenon that chases (potential) investors in the market.

The penultimate chapter of this paper discusses the comparative analysis on the bi-furcated model in Quebec. Quebec, having similar issues as the CMA under the apprehension of bias rule, sought to create an independent body to specifically partake in the adjudication processes. This would see a different actor perform the adjudicative role and hence enhance independence from the regulator. The final chapter focuses on the conclusion and recommendations for the CMA, borrowing from Quebec.

5.2 Recommendation: Bifurcation

Empirical studies have shown that there exists a correlation between a regulator's effective enforcement and maintaining market discipline.[176] As such, there should be a heavy focus on ensuring the balance between procedural fairness and efficiency of the regulator in enforcement. Kenya should adopt a bi-furcated model for its capital markets administration similar to the Quebec system.

This model would see the creation of an entirely separate institution to deal with administrative hearings and sanctions stemming from the capital markets industry unlike the current model of delegation. This would mean that while the CMA deals in other matters such as licensing, supervising, overseeing and developing the market, they would no longer have to hold administrative hearings. Instead, administrative hearings and decisions would be a function of the new creature.

5.2.1 Structure of CMA's bifurcation

Kenya may approach such bifurcation in two ways. Firstly, they could utilize the Capital Markets Tribunal established under Section 35A of the Capital Markets Act.[177] While it currently exists as a secondary mechanism of appeal against CMA issues, it could potentially be utilized as the main adjudicator of disputes involving the capital markets. This may involve having members recruited on a permanent basis whose primary function would be to hear disputes and sanction those found guilty. Alternatively, we could have a newly created body with full time members who perform the adjudicative role.

The body could have well between five to seven members consisting of a chair, vice chair and other members appointed by the government on a permanent basis. They could serve for determinate periods of time with a security over their tenures. The body should portray a different legal personality from its members, and hence shield employees from lawsuits during the discharge of their mandates.

The Chair could assign, control and coordinate the flow of work, assisted by the Vice-chair. Different divisions could then be created to deal with different things depending on the discretion of the body. Remuneration for the members of the body ought to be determined by the

[176]Hans B, Luzi H, Christian L, 'Capital Markets Effects of Securities regulation: The Role of implementation and enforcement', 35.
[177] Section 35A, *Capital Markets Act*.

government. Similarly, their annual budget may be directly funded from the government or through the sums collected by way of sanctions and other financial penalties imposed by the body to errant players.

5.2.2 Likelihood of efficiency for the CMA

Several things would positively change as a result of bifurcation as seen in Quebec. Firstly, we would have adequately divided the overlapping functions of the regulator to ease the apprehension of bias. This is because there is decreased reliance on a single individual partaking in overlapping functions. Instead, entirely different institutions are spearheading the different processes therefore mitigating the risk of apprehended impartiality. Therefore, it seems impossible that a well-informed observer viewing the matter practically would perceive a reasonable apprehension of bias. The biggest impact stemming from this is that the CMA would have an easier path to implementation of its policies as there are little delays due to the lack of appeals.

Furthermore, it would ease the need for the CMA's involvement in remuneration of the adjudicators. Instead, the Tribunal would now have full time members paid by the government. This would mean an additional layer of independence in comparison to the initial model under Section 11A which requires CMA's direct involvement in remuneration.

Again, both institutions would have the required knowledge in dealing with complex securities issues. This is because from both sides, experts exist to perform the regulatory and adjudicatory roles. Similarly, their mandate as investor protectors would mean that they would have to be responsive to the regulatory and enforcement issues raised by the regulator. As such, these two bodies may work in tandem to ensure the stability of the markets.

The bifurcation is likely to work as it did in Quebec due to the existing similarity in regard to procedural fairness. Research as highlighted in the previous chapter has proven how efficient the model may be in solving the regulator's headache.

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